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Supreme Court of the United States

OCTOBER TERM, 1934.

DOCKET NO. 102.

SAMUEL B. SMITH,

Petitioner,

vs.

E. H. SNOW, AND E. H. SNOW DOING BUSINESS AS SNOW'S HATCHERIES AND SNOW'S INCUBATOR COMPANY,

Respondents.

REPLY BRIEF FOR PETITIONER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

(Filed June 11, 1934.)

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The Respondents' Brief in Opposition to the Petition for Writ of Certiorari merely emphasizes the irreconcilable conflict between the decisions of the Circuit Courts of Appeals for the Eighth and Ninth Circuits on the scope of claim 1 of the Smith patent.

POINT A.

BASIS OF DECISION OF CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT IS ITS RECITED DIFFICULTY IN UNDERSTANDING INCUBATOR OPERATION EXCEPT WITH SPECIFIED EGG ARRANGEMENT.

It is quite evident from reading the decision of the Eighth Circuit herein (R. 991 and 70 F. (2d) 564) that the hold-

ing for non-infringement was based upon one major factor. Snow arranged his eggs in a different order than Smith with respect to their ages of incubation. The Court specifically held that such an arrangement as adopted by Snow came within the scope of the claim, saying:

> "The statement of the claim is that the eggs are arranged 'at different levels.' This is broad enough to cover any arrangement at more than one level."

The Circuit Court of Appeals of the Eighth Circuit, however, did not see how the desired result—the equalization of temperature between the fresh, cold eggs and the older, hot eggs—could be secured unless the specific arrangement of the patent was adhered to, saying:

> "* * * it is difficult to see how the desired results can be secured except by a current of air passing first through the trays containing the most advanced eggs."

POINT B.

AIR-MOVING INSTRUMENTALITIES OF SNOW (C. C. A. 8TH) AND ROBBINS (WAXHAM, C. C. A. 9TH) INCUBATORS ARE IDENTICAL AND NO DIFFERENCE IN DIRECTION AND CHARACTER OF AIR CURRENTS EMPLOYED.

As to the direction and character of the air currents employed to secure the desired result, there can be no difference, for the air-moving instrumentalities in the Snow and Robbins (Waxham) incubators are identical.

There has been filed under Docket No. 208 in this Court on the 21st of July, a Petition for Writ of Certiorari in the Waxham case (*Waxham vs. Smith,* 70 F. (2d) 457), in which the incubator employed by Waxham is shown. By comparing the drawings and description of the devices, it will be seen that there is no difference in the design, size,

location or speed of rotation of the air-moving devices in the two machines.

The fans employed by Snow are best shown in Defendants' Exhibits L-3 and L-4 (Snow R., pp. 565 and 567). The fans employed in the Robbins (Waxham) incubators are best shown in Plaintiff's Exhibits 10 and 11 (R., Vol. 2, pp. 16 and 17).

In both cases the fans are of the same design, consisting of four radial blades. Two fans are arranged on one side wall of the incubator cabinet, the only difference being that, as the Snow incubator is larger, two pairs of fans are employed on opposite side walls, whereas in Robbins only one pair is employed. In Snow the fans are five feet in diameter and the blades set at 45° angle (Snow R., p. 91). In the Robbins machine the fans are five feet in diameter and the blades set at 45° (Waxham R., p. 156). In Robbins the fans rotate at from 200 to 220 r. p. m. (R., p. 156). In Snow they rotate at from 208 to 217 r. p. m. (Snow R., p. 85).

The two incubators are identical as to the construction, location and operation of the fans (Snow R., p. 96). It is inconceivable that such conformity were secured except that one infringer copied the other.

Being identical in every respect the operation of the fans is identical, and the movement of air created thereby in the two machines is the same. The air in each machine is drawn into the eye of the fan and discharged centrifugally along the walls, floor and ceiling until it returns to the center in the endless cycles. In both cases the velocity of the air and the direction of its flow through the eggs is the same. In both cases the air inlets for the small amount of fresh air are located in the side walls at the rear of the

fans, and in both cases the outlets for the small proportion of fresh air are located in the ceiling of the machine.

Exact correspondence between the air-moving instrumentalities is found. Beginning at the bottom of page 11 of the brief, Respondent says:

> "From the above it will be seen that the Eighth Circuit in the Snow case found as a fact that there was no general current movement of air in the Snow machine, but, on the contrary, there was merely a general diffusion of the air. On the other hand, the Ninth Circuit in the Waxham case found as a fact that there was a definite and continuous current of air used in the Waxham machine substantially the same as that of the Smith patent. These respective basic facts determined by the Circuit Courts of Appeals in the two different Circuits led the Eighth Circuit to declare that the patent was not infringed and led the Ninth Circuit to declare the patent was infringed."

This is manifestly in error.

POINT C.

Order of Egg Arrangement Constitutes Only Conflict Between Decisions of Circuit Courts of Appeals for Eighth and Ninth Circuits.

It is plainly evident that the Eighth and Ninth Circuits are in conflict on one question only, and that was stated in our petition. The order of egg arrangement was the stumbling block of the Eighth Circuit just as it was the stumbling block of the Sixth Circuit in the Petersime case. (*Buckeye Incubator Co. vs. Petersime,* 19 F. (2d) 721.) The Sixth Circuit corrected itself in the Blum case. (*Buckeye Incubator Co. vs. Blum,* 27 F. (2d) 333.) The Third and

Ninth Circuits were never deceived by the spurious argument that a new circuit was set up all the time. The amount of air exchanged is only about 1% in the Snow case and about the same in the Waxham case, and the main body of air is not affected in its function as a recirculating heat carrier by this interchange. This was the conclusion of the Sixth Circuit in the Blum case, the Third Circuit in the Hillpot case (*Buckeye Incubator Co. vs. Hillpot,* 24 F. (2d) 341) and the Ninth Circuit in the Waxham case. Only the Eighth Circuit adheres to the discredited theory that the heat interchange called for by the claim can only be performed when the eggs, in the different ages of incubation, are arranged in the order shown in the patent.

Attention is specifically directed to the copending Petition for Writ of Certiorari in the case of *Waxham vs. Smith,* referred to above. The instant case and that case clearly parallel one another, and the only conflict arising between the Eighth and Ninth Circuits is based upon the opposing views of these two Circuits as to whether the arrangement of eggs is the controlling factor which determines infringement.

For this reason we believe that the Writ of Certiorari should be granted, *but the question in issue should be restricted in both cases to the single point upon which alone the conflict of opinion is based, i. e., the effect of egg arrangement upon infringement.*

Dated August 2, 1934.

Respectfully submitted,

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